

IN THE  
**Supreme Court of the United States**

Supreme Court, U. S.  
**FILED**

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October Term, 1976

No. **76-234**

BOYD JAMES O'DONNELL,

*Petitioner,*

vs.

UNITED STATES OF AMERICA.

**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

THOMAS R. SHERIDAN,  
DOUGLAS G. SIMON,  
RANDALL E. GREER,  
SIMON & SHERIDAN,

2404 Wilshire Boulevard, Suite 400,  
Los Angeles, Calif. 90057,

*Attorneys for Petitioner  
Boyd James O'Donnell.*

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*Petitioner,*

vs.

UNITED STATES OF AMERICA.

### **Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

Boyd James O'Donnell, your petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on July 20, 1976.

### **Opinions Below.**

In accordance with a plea bargain, petitioner pleaded guilty to one count of a 31 count indictment in the United States District Court for the District of Arizona. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, and on July 20, 1976, a panel of that court affirmed petitioner's conviction. The opinion has not yet been officially reported. It is reproduced as Appendix A hereto.

### **Jurisdiction.**

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on July 20, 1976. (See Appendix A.)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### **Questions Presented.**

#### **I**

Does a plea of guilty waive Fifth Amendment due process and Sixth Amendment speedy trial violations?

#### **II**

Did the District Court comply with Rule 11, Federal Rules of Criminal Procedure, in accepting petitioner's plea of guilty?

### **Constitutional Provisions and Statutes Involved.**

#### **Constitution of the United States.**

##### **Fifth Amendment.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **Sixth Amendment.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

#### **Federal Rules of Criminal Procedure.**

##### **Rule 11. Pleas.**

A defendant may plead not guilty, guilty or, with consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere*, without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.\*

#### **Statement of the Case.**

Petitioner was initially charged in a two count indictment returned on May 30, 1974. Shortly thereafter,

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\*This is the text of Rule 11 as enacted when petitioner offered his guilty plea on November 18, 1975. However, Rule 11 has been substantially revised, and such revisions were effective on December 1, 1975.



petitioner was properly arraigned and entered pleas of not guilty to both counts. Trial was set to commence on November 26, 1974, approximately six months later. Prior to trial, on November 5, 1974, the government filed a motion to vacate the trial date. Over the strenuous objections of defense counsel, the district court granted this motion but did not set a new trial date.

Thereafter, on January 8, 1975, a superseding indictment was returned, charging the defendant with 31 counts of making a false oath in connection with a bankruptcy proceeding, in violation of 18 U.S.C. §152. The defendant was properly arraigned shortly thereafter, and entered a not guilty plea to all 31 counts. Trial was set to commence on November 18, 1975, almost one year from the date initially set for trial.

On October 30, 1975, petitioner filed a motion to dismiss the superseding indictment upon two related constitutional grounds. First, petitioner was denied a speedy trial, as required by the Sixth Amendment, based upon the government's prejudicial post-indictment delay. Second, due process of law was denied petitioner, in violation of the Fifth Amendment, based upon the government's prejudicial pre-indictment delay. After a hearing on November 7, 1975, the motion was denied by the district court.

On November 18, 1975, in accordance with a plea bargain, petitioner offered a plea of guilty to Count XI of the superseding indictment. The district court accepted the guilty plea. The government then dismissed the remaining counts of the superseding indictment, and all proceedings against petitioner's former wife, Joan O'Donnell.

On December 8, 1975, almost 6 years from the date of the alleged offense, the Honorable Walter E. Craig, United States District Judge, sentenced the defendant to 3 years in the custody of the Attorney General. A stay of execution was granted until December 29, 1975.

On December 16, 1975, a timely notice of appeal was filed with the Clerk of the United States District Court, District of Arizona. Since the filing of the initial indictment, petitioner has remained at liberty on the bond.

On May 13, 1976, this matter was argued before a panel of the Court of Appeals for the Ninth Circuit. On July 20, 1976, an opinion of that panel was filed affirming petitioner's conviction. (See Appendix A.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals for the Ninth Circuit affirming petitioner's conviction.

## REASONS FOR GRANTING THE WRIT.

### I

#### A Plea of Guilty Does Not Waive Fifth Amendment Due Process and Sixth Amendment Speedy Trial Violations.

This Court has never spoken directly to the issue of whether a defendant waives by his guilty plea a violation of the Due Process Clause of the Fifth Amendment based upon unreasonable pre-indictment delay. Similarly, this Court has yet to decide whether a defendant's guilty plea waives his claim under the Sixth Amendment based upon a denial of a speedy trial. However, a recent opinion by this Court does provide some guidance.

In *Menna v New York*, 423 U.S. 61, 96 S.Ct. 241 (November 17, 1975), this Court held that a defendant's rights under the Double Jeopardy Clause of the Fifth Amendment are not waived by a guilty plea.

"Where the State is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty. *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S.Ct. 2098, 2103, 40 L.Ed.2d 628 (1974)." 423 U.S. at 62, 96 S.Ct. at 242 (footnote omitted).

The footnote which appeared following the above quote is particularly relevant to the instant case. It reads, in pertinent part, as follows:

"A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt

and which do not stand in the way of conviction if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.

"We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." 423 U.S. at 62, 96 S.Ct. at 242, n.2. (Emphasis added.)

Thus, a constitutional violation which would prevent the government from maintaining the prosecution is not waived by a plea of guilty, even if the plea is made voluntarily and knowingly. An application of the above rationale involves the constitutional violation considered in *Menna*, the Double Jeopardy Clause. Once jeopardy has attached, the government, either state or federal, may not prosecute an individual for the same offense.

Similarly, once it is determined that the government is guilty of pre-indictment delay or post-indictment delay, the prosecution must be terminated.

*United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971);

*Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101 (1972).

Thereafter, the government is forever barred from proceeding on that offense.

The situation presented by the instant case is analogous to that presented in *Menna*. If prejudicial pre-

indictment delay or post-indictment delay is found to be present in the instant case, then the government is constitutionally barred from maintaining this prosecution. Thus, under the rationale of *Menna*, petitioner, by pleading guilty, did not waive his right to assert these constitutional violations.

In its opinion the Ninth Circuit held that a guilty plea does waive Fifth Amendment due process and Sixth Amendment speedy trial violations because:

"The Constitution protects the accused from a conviction by trial but *not* a conviction by way of a plea of guilty." (See Appendix A, p. 8.) (Emphasis added.)

The Court of Appeals reasoned that the purpose of these constitutional provisions is "to insure that factual guilt is validly established," and that "[t]he existence of such violations is consistent with guilt as a matter of fact." (*ibid.*)

To allow such an interpretation of these vital constitutional provisions will have serious ramifications, both for future defendants and for the federal courts. The Ninth Circuit's opinion failed to consider that dilatory tactics by the government may have influenced a defendant to plead guilty, as when key defense witnesses have died or otherwise become unavailable. Further, if the government is guilty of pre-indictment or post-indictment delay, it may cure these constitutional violations by simply offering the defendant a plea bargain which he cannot refuse. At that point, the government has placed a price on the defendant's exercise of his constitutional rights. If the defendant accepts the plea bargain, then he waives his right to assert on appeal these constitutional violations which should have terminated the prose-

cution in the first instance. If he refuses the plea bargain then he may raise these issues on appeal, but must first go through a trial where his defense has been prejudiced by the government's dilatory tactics and, consequently, there exists a greater likelihood of conviction. Under such circumstances, cases which could have been disposed by plea will go to trial solely to preserve these constitutional issues on appeal. Such a rule does not promote judicial economy.

In light of this Court's clear holding in *Menna* that it is the government's ability or inability to maintain a prosecution which is the key in determining whether a plea of guilty waives a particular constitutional violation, this erroneous and restrictive holding by the Court of Appeals should be reviewed by this Court. To do otherwise will result in serious constitutional prejudice to future defendants to which the federal courts should not be party.

For the reasons expressed above, petitioner requests that certiorari be granted to decide this constitutional Question.

## II

### **The District Court Failed to Comply With Rule 11, Federal Rules of Criminal Procedure, When It Accepted Petitioner's Guilty Plea.**

In *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), this Court held that a district court must strictly adhere to the provisions of Rule 11, F.R.Cr.P., in accepting a guilty plea. In the absence of such strict adherence, the guilty plea must be vacated. Among the requirements of Rule 11 are that a defendant enter the plea voluntarily and that he understand the nature of the charge



and the consequences of his plea. Also, there must be a factual basis for the guilty plea. The explanations and findings which are required by Rule 11 must be made on the record.

*McCarthy v. United States*, 394 U.S. at 470, 89 S.Ct. at 1173;

*Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971).

At the time that the district court accepted petitioner's guilty plea it failed to comply with Rule 11 in that: (1) no determination was made that petitioner acted with the requisite intent to defraud; (2) no determination was made that the false oath went to material facts; (3) petitioner was not placed under oath when examined by the district court when it attempted to establish a factual basis for the plea and (4) petitioner was not informed of the elements of 18 U.S.C. §152, the offense to which he pleaded guilty.

Instead, the district court merely read the substance of Count XI, the count to which petitioner pleaded guilty, and then asked: "Generally, are those facts true?" Petitioner replied: "Yes." Clearly, this cursory and shallow inquiry does not satisfy the requirements of Rule 11.

In its opinion affirming petitioner's conviction, the Ninth Circuit overlooked many of the district court's errors in accepting the guilty plea. For example, the Court of Appeals makes reference to the fact that petitioner was informed of the maximum possible sentence he (petitioner) could receive, but fails to note that it was the Assistant United States Attorney who informed petitioner of that fact, and not the district court as required by Rule 11. At least one other

Court of Appeals had held that such a departure from the requirements of Rule 11 mandates that the guilty plea be set aside.

In *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976), the Court of Appeals for the Fifth Circuit vacated a defendant's guilty plea based upon the district court's failure to personally address the defendant as to: the range of possible penalties; whether the defendant understood the nature and consequences of this plea; and whether the defendant made his plea freely and voluntarily. Rather than the court, the prosecutor made those inquiries of the defendant. The district court in *Crook* directly questioned the defendant only to establish a factual basis for the plea. At the time that the defendant in *Crook* entered his guilty plea the 1975 Amendments to Rule 11 were not in effect. All other requirements of Rule 11 were apparently met when the guilty plea was accepted. Thus, the Fifth Circuit has held that a guilty plea must be set aside if a district court does not personally address the defendant. This is in direct conflict with the Ninth Circuit's opinion affirming petitioner's conviction.

At the time of accepting petitioner's guilty plea, the district court failed to make any inquiry into petitioner's conduct which supposedly constituted the offense charged. Nor did the district court inquire of the government as what its proof would have been had the matter proceeded to trial. Instead, the district court was satisfied with petitioner's response that the facts as contained in the count to which he (petitioner) was pleading guilty were "generally" true.

Rule 11 is designed to insure that when a defendant enters a guilty plea it is done voluntarily and with a full understanding of the consequences. In order



to insure that these requirements are met, Rule 11 mandates that a district court establish, *on the record*, that a defendant is entering his plea voluntarily, with a full understanding of the consequences, and that there is a basis in fact for the plea. This type of inquiry necessarily requires a district court to conduct a thorough probe of the facts surrounding each plea. In the instant action, the district court failed to fulfill its obligation under Rule 11.

Finally, a recent decision of the Court of Appeals for the First Circuit indicates that there, too, the district court must strictly adhere to the requirements of Rule 11 in accepting guilty pleas. In *United States v. Yazbeck*, 524 F.2d 641 (1st Cir. 1975), the First Circuit vacated a guilty plea based upon the district court's failure to advise the defendant of the existence of a special parole provision. The special parole provision was found to be included within the requirement of Rule 11 that the defendant understand the consequences of his plea.

Based upon this Court's holding in *McCarthy* that the requirements of Rule 11 be strictly followed and the conflicting decisions among the various Courts of Appeals, petitioner respectfully urges that certiorari be granted as to this Question.

**Conclusion.**

For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

THOMAS R. SHERIDAN,  
DOUGLAS G. SIMON,  
RANDALL E. GREER,  
SIMON & SHERIDAN,

*Attorneys for Petitioner*  
*Boyd James O'Donnell.*

# APPENDIX

## **APPENDIX A.**

### **Opinion of the Court of Appeals for the Ninth Circuit.**

United States Court of Appeals, for the Ninth Circuit.

United States of America, *Appellee*, vs. Boyd James O'Donnell, *Appellant*. No. 76-1003.

### **OPINION**

[July 20, 1976]

Appeal from the United States District Court for the District of Arizona.

Before: WALLACE and SNEED, Circuit Judges, and  
FERGUSON,\* District Judge.

SNEED, Circuit Judge:

Appellant O'Donnell appeals the district court's judgment which convicted him upon his plea of guilty of violating Title 18, U.S.C. § 152<sup>1</sup> (knowingly and fraudulently making a false oath in relation to material matters in a bankruptcy proceeding) as charged in Count XI of the indictment. Our jurisdiction rests on 28 U.S.C. § 1291.

In this appeal O'Donnell contends: (1) his plea of guilty did not conform with Rule 11 of the Federal Rules of Criminal Procedure; (2) he was denied his constitutional rights to due process of law and to a speedy trial; (3) these constitutional rights are not

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\*Honorable Warren J. Ferguson, United States District Judge for the Central District of California, sitting by designation.

<sup>1</sup>18 U.S.C. § 152 provides in pertinent part:

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

waived by a plea of guilty; (4) Count XI failed to state an offense.

Appellant therefore urges that we should set aside the guilty plea, vacate the judgment, and remand the case to the district court with directions that appellant be permitted to plead anew. We reject appellant's contentions, and affirm the judgment of the district court.

I.

*Facts.*

On May 30, 1974, Boyd James O'Donnell was charged in a two-count indictment for his acts of March 13, 1970, which allegedly violated 18 U.S.C. § 152 and for his acts of April 7, 1970, which allegedly violated 18 U.S.C. § 1621 (perjury). Trial was set for November 26, 1974, but the date was vacated on November 5, 1974.

On January 9, 1975, the grand jury filed a thirty-one count superseding indictment, charging the appellant with thirty-one violations of 18 U.S.C. § 152 arising from acts occurring on either March 13, 1970, or April 7, 1970. Count XI of this indictment charged the appellant with knowingly and fraudulently making a false oath as to material matters relating to his bankruptcy consisting of his knowing and fraudulent statement in his petition for bankruptcy that he was employed by United International Corporation of Phoenix, Arizona, whereas in truth and in fact, appellant then knew he was not employed by United. Trial was set for November 18, 1975.

On October 30, 1975, appellant filed a motion to dismiss the indictment on the grounds that the pre-indictment and post-indictment delays had deprived the

appellant of his rights to due process of law and to a speedy trial, as guaranteed by the Fifth and Sixth Amendments. The motion was denied on November 7, 1975.

Appellant on November 18, 1975, entered a plea of guilty to Count XI of the indictment. All other counts of the indictment were dismissed on December 8, 1975.

II.

*Compliance With Rule 11.*

At the time that O'Donnell entered his guilty plea in the instant case, Rule 11 of the Federal Rules of Criminal Procedure provided that before a district court could accept a plea of guilty, it must determine that the plea is made voluntarily, with an understanding of the nature of the charge and the consequences of the plea. The court must also be satisfied that there is a factual basis for the plea. Rule 11(f).

While Rule 11 does not require that the district court observe any particular ritual, it does require that the judge employ procedures sufficient to determine that the defendant understands the charges against him and the consequences of his plea, and that the defendant's plea is truly voluntary. *Guthrie v. United States*, 517 F.2d 416, 418 (9th Cir. 1975); *United States v. Youpee*, 419 F.2d 1340, 1344 (9th Cir. 1969); *Munich v. United States*, 337 F.2d 356, 359 (9th Cir. 1964).

Rule 11 is also designed to produce a complete record when the plea is entered of the factors relevant to determining whether the Rule has been complied with in order to suppress frivolous attacks on the constitutional validity of the plea. *Santobello v. New*



*York*, 404 U.S. 257, 261 (1971); *McCarthy v. United States*, 394 U.S. 459, 465 (1969); *Guthrie v. United States*, *supra* at 418 (9th Cir. 1975). If the district court fails to comply with Rule 11, the plea entered thereunder must be set aside and the case must be remanded in order to permit the defendant to plead anew. *McCarthy v. United States*, *supra* at 463-64 (1969).

After carefully examining the record, we are satisfied that the requirements of Rule 11 have been met. The record established that appellant was 58 years old, was not under the influence of any drug, medication or alcohol that might impair his reasoning, had a college education, and had been involved in court proceedings prior to the charges involved in the present case. O'Donnell was apprised of the fact that by pleading guilty he waived his constitutional right to a jury trial and the penumbral rights thereof, and he was informed that the maximum possible sentence for Count XI was five years imprisonment and a \$5,000 fine. The court read the substance of Count XI to O'Donnell and then asked: "Generally, are those facts true?" O'Donnell answered, "Yes, they are." He also informed the court that before deciding to plead guilty, he had discussed the charges and facts set forth in Count XI with his attorney. O'Donnell also stated that he was pleading guilty to Count XI because he was guilty of the charges and for no other reason.

From the record it appears that O'Donnell understood the nature of the offense charged in the indictment and that his plea clearly was voluntary. The record also establishes a factual basis for accepting the guilty plea. We therefore reject appellant's contention with respect to Rule 11. See *Guthrie v. United States*, *supra*

at 418-19; *United States v. Youpee*, *supra* at 1343-44. Our decision in *Salas v. United States*, 529 F.2d 1276 (9th Cir. 1975), is not to the contrary.

### III.

#### *Waiver of Pre-Trial Constitutional Violations by Guilty Plea.*

The Sixth Amendment's guarantee of the right to a speedy trial is activated only when the putative defendant in some manner becomes an "accused." *United States v. Marion*, 404 U.S. 307, 313 (1971). Dismissal of the conviction and indictment, moreover, is the only proper remedy for deprivation of one's right to a speedy trial. *Strunk v. United States*, 412 U.S. 434, 440 (1973). The Fifth Amendment, on the other hand, requires only that an indictment be dismissed if it is shown that the preaccusation delay substantially prejudiced the defendant's right to receive a fair trial. 404 U.S. at 326. Appellant became an accused when he was indicted by the grand jury.

The Supreme Court of the United States has never explicitly considered whether a guilty plea waives these specific rights, but recent court opinions do provide guidelines. The guilty plea trilogy of *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); and *Parker v. North Carolina*, 397 U.S. 790 (1970), stand for the general rule that a guilty plea that is intelligently and voluntarily made, precludes later constitutional challenges to the pretrial proceedings. *Lefkowitz v. Newsome*, 95 S.Ct. 886, 889 (1975).

The principle of the *Brady* trilogy was reaffirmed in *Tollett v. Henderson*, 411 U.S. 258 (1973). Speaking for the Court, Mr. Justice Rehnquist stated:

We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*. *Id.* at 267.

*Menna v. New York*, 96 S.Ct. 241 (1975) is the latest decision of the Court in this area. *Menna* held that a defendant's rights under the Double Jeopardy Clause of the Fifth Amendment are not waived by a plea of guilty to a charge with respect to which the Constitution precludes the State from prosecuting. *Id.* at 242, n.2. The court explained that neither *Tollett* nor the *Brady* trilogy hold that counseled pleas of guilty inevitably waive all antecedent constitutional violations. Instead, these cases stand for the proposition that pleas of guilty, when made voluntarily and intelligently, are admissions of factual guilt which are so reliable, that the issue of factual guilt is removed from the case. "A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Id.*

The appellant in the instant case argues that the rights guaranteed by the Due Process Clause of the

Fifth Amendment and by the right to a speedy trial of the Sixth Amendment are analogous to the rights protected by the Double Jeopardy Clause of the Fifth Amendment. He therefore contends that his guilty plea did not waive these violations. We disagree.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the court observed that the Double Jeopardy Clause provides three related protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. *Id.* at 717.

The underlying premise of these protections is that "[w]hen a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *United States v. Wilson*, 95 S.Ct. 1013, 1021-22 (1975). [Citations omitted]. Thus the very initiation of the proceedings in *Menna* operated to deny the defendant his right against double jeopardy. The Constitution protects him from a second conviction whether its origin is a trial or a plea of guilty.

The protections afforded by the Fifth and Sixth Amendments are different. Their purpose is to insure that factual guilt is validly established. That is, their purpose is to guarantee that the accused's right to a fair trial is not substantially prejudiced by either pre- or post-accusation delays. The existence of such violations is consistent with guilt as a matter of fact.



If guilt can be validly established such violations are not logically inconsistent therewith. While such violations preclude the establishment of guilt by trial, that is the extent of their reach. The establishment of guilt by a proper plea is not condemned by these protections. The Constitution protects the accused from conviction by trial but not a conviction by way of a plea of guilty. *Tollett* and the *Brady* trilogy control here. *Menna* is inapplicable.<sup>2</sup> For this reason it is not necessary for us to consider the merits of O'Donnell's constitutional claims.

#### IV.

##### *Failure to State an Offense.*

We have construed 18 U.S.C. § 152 to require that false oath be given in relation to some material matter. *Metheany v. United States*, 365 F.2d 90 (9th Cir. 1966), *appeal after remand*, 390 F.2d 559, *cert. denied*, 393 U.S. 824 (1968).

Count XI of the indictment charged that O'Donnell knowingly and fraudulently made a false oath as to material matters relating to his bankruptcy petition in that he knowingly and fraudulently stated that he was employed by United International Corporation of Phoenix, while in truth and fact he was not employed by United.

O'Donnell's principal argument is that the false statements alleged in Count XI were immaterial, since they *overstated* his current earning capacity. Appellant therefore contends that to constitute material false statements,

<sup>2</sup>Moreover, even if a plea of guilty did not in and of itself waive a speedy trial defense, the defendant here specifically was asked to and did waive "any defenses" that he might have to the charge in question. No such specific waiver was present in *Menna*.

the statements would have to *minimize* his earning capacity. We disagree.

Materiality does not require a showing that creditors are harmed by the false statements. *See In Re Robinson*, 506 F.2d 1184, 1188-89 (2d Cir. 1974). Matters are material if pertinent to the extent and nature of bankrupt's assets, including the history of a bankrupt's financial transactions. *See Metheany, supra*. Materiality is also established when it is shown that the inquiry bears a relationship to the bankrupt's business transactions or his estate, *Willoughby v. Jamison*, 103 F.2d 821, 824 (8th Cir.), *cert. denied*, 308 U.S. 588 (1939), or concerns the "discovery of assets, including the bankrupt's financial transactions." *In Re Mascolo*, 505 F.2d 274, 277 (1st Cir. 1974). Statements designed to secure adjudication by a particular bankruptcy court are also material. Under these standards O'Donnell's false statements cannot be considered immaterial. They concerned his ability to acquire assets and may have tended to assure the bankruptcy forum he desired. They were material to his creditors, to him, and to the bankruptcy court. This surely is enough.

The judgment of the district court is  
AFFIRMED.